

STATE OF CIRCUIT SPEECH  
Monday, July 18, 2005  
Spokane, Washington  
Chief Judge Mary M. Schroeder

My theme for this afternoon is public service. It is illustrated by these two contrasting photographs, intended to symbolize two profound truths brought home to me this year.

Truth number one is that our role within the framework of the Constitution calls upon us to deal from time to time with the powerful. Hence the picture of Chairman Sensenbrenner of the House Judiciary Committee, taken at the time of his meeting last spring in San Francisco with some of our circuit and district judges. Truth number two is that at the same time, our work requires us to deal increasingly with the powerless. Hence the photo from the field trip I took, with some of our judges and staff, to the Bell Shelter for the Homeless, operated by the Salvation Army in Los Angeles. The dining hall is named in honor of Judge Harry Pregerson of our Court of Appeals, because of his tireless work in making the shelter possible, through utilization of abandoned federal property. Later in these remarks I will talk about some remarkable public service by other judges, above and beyond the call of the courthouse.

But let me begin my report by saying that the state of the circuit is remarkably good, all things considered. Before I explain what that means, I take this joyful opportunity to welcome you to the 2005 Conference. We are convened in one of the nicest towns in the west, Spokane, in one of the most spectacular districts in the west, the Eastern District of Washington, in the most spectacular judicial circuit in the land, the Ninth Circuit. (With all due respect to my good friend Deanell Tacha, I was born in the Tenth Circuit, and had I stayed there I might beg to differ with my own opinion, but I didn't, so I don't.)

I fell in love with the Eastern District early on when I came here to help appoint John Rossmeissel to the bankruptcy bench of this district. John retired this year, but we have finally been able to bring the entire conference to Spokane. This District's Judges, lawyers, and the City of Spokane have really knocked themselves out to welcome us and to show off the warmth and hospitality of this

city. In case any of you missed it, the Spokane Symphony put on a concert yesterday in an ideal setting that was above and beyond any civic display of hospitality we could have imagined. I hope all of you will express your thanks to the delegates from the Eastern District and its judges led by Chief Judge Fred Van Sickle and, for that matter, thank any folks you happen to meet on the street.

The Eastern District, by the way, is celebrating its 100th anniversary this year, and we have an historical video to be shown during the conference.

Next door to us here in Spokane is the Eastern District's sister district, the District of Idaho with one of our crown jewels, Lake Coeur d'Alene. You should all get over there and see it if you haven't already. It's the Western District of Washington's 100th birthday as well.

The Ninth Circuit also includes Hollywood, but unlike Hollywood, I am going to begin with the credits rather than end with them as they are so richly deserved for this conference. The education program, with its surrounding events, promises to be of exceptional quality. The Conference is co-chaired by a great bench-bar duo, Chief Judge David Levi of Sacramento and Attorney Alan Schulman of San Diego. They symbolize the unsurpassed cooperation between lawyers and judges in this circuit, that annually makes this conference one of the top legal education programs in the country.

Our Program chair this year is Magistrate Judge Sandra Snyder of Fresno, a highly capable jurist and very nice person, who is the first Magistrate Judge in our Circuit to hold that important leadership position. Her role here exemplifies another one of our Circuit's trademarks: its inclusiveness. We don't exclude our bankruptcy and magistrate Judges, or our Senior Judges, from leadership in policy and in education. They have too much talent – we consistently learn from them, and vice versa.

Next year's conference will be held in Huntington Beach, California. It will be chaired by Sandra Snyder, the first Magistrate Judge to hold that position. I am also pleased to announce that the program chair for next year's conference will be a district judge I have been quoted as calling "a legend in waiting"– Chief District Judge Robert Lasnik, from Seattle.

These conferences would not be possible without prodigious work, both in quantity and quality, by our staff. Those deserving particular conference plaudits include Renee Lorda of the Circuit Executive's Office, Susan Newell of our Court of Appeals Clerk's Office, and David Madden who does our press relations for the Circuit Executive.

While on the subject of conferences, I want to take just a moment to reflect upon the contributions of one person who has probably done more than any other to make our Ninth Circuit conferences so successful—our Circuit Justice, Sandra Day O'Connor. She has graciously attended our conferences, answered our questions, and been a role model for our daughters for a long time.

Sandra and I go back more than 30 years. Our first collaboration came when I was practicing law in Phoenix and she was the Majority leader of the Arizona State Senate. The state bar announced an ethics opinion that would have made it almost impossible for women with lawyer husbands (which was almost all of us) to become judges. Sandra and I made a deal. First, we enlisted the assistance of women law students to do some research; next John Frank and I drafted a letter to the ethics committee. Then Sandra polished and signed it (but, of course, only after she made it a lot more even handed and diplomatic). Needless to say the offending opinion promptly vanished. We all wish Sandra and John, their sons and grandchildren the very best.

When Sandra announced her retirement bombshell, I publically observed that she has been a superb Circuit Justice and that she will always be welcome whenever Ninth Circuit Judges and lawyers gather. I am sure you join me in that sentiment of appreciation and in that invitation.

In the short time I have with you I want to do three things: first to summarize the year's significant milestones; second to talk about some of the problems that are facing the judiciary as a whole, and what the Ninth circuit is trying to do about them; particularly as they relate to our relations with the Congress, and third; to put the spotlight on some of our judges who have demonstrated a commitment to service in outstanding ways.

I will close, as usual, with a few highlights of my own year.  
First for the milestones or, this year, lack thereof:

This year we did not have any new Circuit Judge nominees or confirmations. In fact, we regretfully saw one highly-qualified nominee Debra Yang, the U.S. Attorney for the Central District of California – withdraw for personal reasons. This is particularly regrettable, as she stood to become the first Asian-American woman federal appellate judge in history. I told Debra I hope the brass ring will come around again and she can grab it.

Speaking of firsts, there are a lot of women in this audience who have been a first, so let me drop a footnote to observe that tomorrow, July 19, marks the anniversary of the First Conference on Women's Rights, organized in 1848 by Elizabeth Cady Stanton and Lucretia Mott in Seneca Falls New York.

Back to the present. We still have four vacancies on the Court of Appeals. There is one nomination, for T.G. Nelson's seat from Idaho, that has been pending for two years.

We had only one District judge confirmed. Mike Seabright of Hawaii. I was there the day he got the news and it was a great day in Honolulu, for the seat had been vacant since 2000. There are 8 district court vacancies.

On a cheerier note, Congress named our Courthouse at Seventh and Mission for our beloved colleague, James R. Browning, and we celebrated the 100th Anniversary of the building earlier this year with a evening of music, history and a colorful re-enactment of a Chinese Exclusion Act case first argued in 1905. The re-enactment was so good KQED taped the entire thing and broadcast portions on Public Television in San Francisco. Its stars were District Judges Chuck Breyer as the heartless government lawyer and Marsha Pechman as the eloquent but tragically unsuccessful attorney for the 15-year-old girl, Ah So, who in real life was eventually ordered returned to slavery in China. KQED and one of its stars, Spencer Michels, also did a half hour show on the courthouse and our court that aired last month. The photography of the interior is awesome.

The re-enactment was but a small part of the Article III Judges Educational Program, put on by our Education Committee, chaired by the inestimable Margaret M. McKeown. As a true citizen of the circuit, she now hales from both Seattle and San Diego. Justice O'Connor was there and rhapsodized melodically on the subject of "Music and the Law" and our Ninth Circuit string "courtette" played Dvorak's

American Quartet.

The evening program was only a part of an overall education program sponsored by the Federal Judicial Center that was outstanding. The Federal Judicial Center is headed by the Ninth Circuit's own Western District of Washington Judge Barbara Rothstein. Indeed three of the last four heads of the FJC have been from the Ninth Circuit—a tribute to the high quality educational programs we have developed in many venues. Our former directors include Fern Smith of the Northern District of California, who retired from the judiciary a few weeks ago. We wish her well. The other is Senior District Judge Bill Schwarzer, who will receive the prestigious Devitt Award this October.

The Chinese exclusion re-enactment will be repeated as one small part of our gala civic celebration of our building's centennial on its actual 100th birthday, August 29. Organized by Circuit Judge Marsha Berzon, with an able assist from her San Francisco colleague, Judge Carlos Bea, we will welcome California congressional representatives, the Mayor, and other dignitaries, including Teddy Roosevelt and a brass band. The building is a national treasure and it is our honor to occupy it.

Throughout this year, and in all likelihood for the next few years as well, the overarching issue facing the federal judiciary as a whole is its strained relationship with Congress. This makes itself felt in a variety of ways, most notably in annual budget shortfalls that leave us scrambling, literally, to pay the rent. This now is pushing 25% of our overall budget. When fixed costs go up we have no choice but to cut back on the staff that is so important to serving a growing demand for access to the federal courts in the west. The Judicial Conference U.S. has even resorted to a two-year moratorium on all new building construction to try to limit the outlay for rent.

We in the Ninth have been fortunate in many ways, but nowhere as conspicuously as in our planning for our building needs. Our Space and Security Committee, chaired by Circuit Judge Mel Brunetti, is the only one like it in the country. It prioritizes our needs and has led to funding for much needed facilities from Seattle to San Diego. The biggest remaining need is in Los Angeles, the largest federal judicial district in the country and now housed in substandard downtown Los Angeles buildings. Tune in next year to see if we have any positive

news.

And, speaking of the Central District, we are very proud of the Ronald Reagan courthouse in Santa Ana. This fall the Central District's Chief Judge's gavel will pass from Chief Judge Consuelo Marshall to Judge Alicemarie Stotler, for the first time the District's Chief Judge will be from Orange County. I observe as well the retirement of one of the district's most respected Orange County Judges, Gary Taylor.

There are, of course, bills in Congress to split the circuit. Although they do not agree on how to do it, they would all require one, or even two new headquarters that would take years to complete, with money we do not have, and need desperately to staff our existing circuit and district court clerks' offices.

Congress at the moment, however, has other priorities. A top priority for both Congressional Judiciary Committees has to be security. This was brought home dramatically this year by the tragic murders of Judge Lefkow's family in Chicago; the shootings in state court in Atlanta, and the breach of security in our new courthouse in Seattle a few weeks ago that led to the fatal police shooting of the intruder. I am optimistic that the Ninth Circuit may make some positive contributions toward improving our security nationwide. Indeed, this was among the many topics discussed in our meeting in San Francisco in March with Chairman Sensenbrenner, and that meeting has in turn led to further meetings with the House Judiciary Committee staff to discuss security issues for judges, their families, and their courtrooms, and including all of you who regularly appear in them. I am extremely grateful to Chief Judge McNamee of the District of Arizona for invaluable expertise.

Arizona is, of course, a border district, as is the Eastern District of Washington – only a different border – and this brings me to another great set of issues facing the country and which particularly affects the Ninth Circuit. That is immigration and maintaining the security of our borders. We hope to work with Congress and with other circuits that share our needs and concerns. Bob Whaley of this district, like Judge McNamee, is a member of our Space and Security Committee, and he should be a key player, along with Chief Judge Don Molloy of Montana as we face issues on our northern border.

In a related area, the Court of Appeals this year felt the full force of the growing wave of immigration administrative appeals of deportations. These are caused principally by Executive branch decisions to step up deportations, while diminishing the availability of administrative appellate review. Our administrative immigration review caseload has risen nearly 600% in the past four years, which is a lot, but is nothing compared to the 2000% in the Second Circuit. We have been in close contact with that circuit's staff, and with its Chief Judge. They are studying some of the techniques we have developed over many years to deal with increasing numbers of cases and inadequate judicial resources. (Our court of appeals has had no new judgeships since 1984 and there has been no omnibus judgeship act for the country since 1990). We have and will continue to work with the judges and Congressional representatives of other circuits, particularly those with border and immigration issues, to obtain the judicial and financial resources needed to serve litigants and the Constitution.

Indeed, if there is one message that should go forth from this meeting to all of our elected representatives, it is the crying need for all of our constitutional branches of our government to recognize that they are, at the same time, both independent of and interdependent on the other branches. Nowhere is that independence and interdependence more dramatically exemplified than in the nomination and confirmation process of a Supreme Court Justice, but that is just the tip of the iceberg. The Executive cannot enforce the laws Congress passes without an adequately staffed judicial branch to decide the cases. This principle is inherent in the very work we judges and lawyers do every day in every federal court in the land.

We in the Ninth Circuit have worked very hard this year to try to do what we can to improve our relations with Congress. Our chief district judges have met congressional leaders and with leaders of the Judicial Conference U.S. Committees in order to explore what is needed to be done. Our chief district judges and chief bankruptcy judges also have Congressional relations on the top of their agendas at their biennial meetings.

At the same time we also continue to be in the forefront of all courts in developing programs that teach us how to do our work better. Our Court of Appeals' guru in figuring out how to cope with rising caseloads is Judge Sid Thomas of Montana, and he deserves a medal, since he is clearly not going to get

any time off. Kudos go to our superlative staff, headed by Clerk Cathy Catterson and Deputy Clerk Molly Dwyer who are heroines in helping us administratively keep on top of the load and in supervising our high quality professional staff of attorneys in San Francisco.

This year we lost the judges memorialized in your booklet, including the great judge who inspired our circuit's pioneering work in judicial health and disability, Judge Judith Keep. Her legacy lives on with a program during this conference on preserving memory. Her successor, Susan Graber, ably implemented the recommendations of the Keep committee and broke new paths for the federal courts, so that federal judges throughout the country now are realizing that judges are human beings and cannot always cope by themselves.

I am pleased to announce this afternoon the beginning of the newest chapter in our Circuit's efforts in this area. This project is now more than just a gleam in my eye, because I have successfully enlisted the services of two of our judges most sensitive to judges' human needs. This project will focus on ways to help our chief judges intervene responsibly to assist judges who need to reduce, or terminate their participation in cases, and to facilitate those judges' access to professional services. I am very proud that the judge who has agreed to chair it is one who has been committed to these goals since serving on Judge Keep's original disability task force. He is Chief Judge Philip Pro of the District of Nevada. I am equally proud that a District Judge who is well known to his Arizona colleagues as a man of ability and compassion, has agreed to assist Chief Judge Pro in putting this project together, Judge James Teilborg. Once again, tune in next year.

Our Circuit, like the rest of the country, has experienced a rise in the percentage of cases in which one party is not represented by counsel. This trend will continue. Our Pro Se Task Force chaired by genial Jim Singleton of Alaska with an assist from the ever graceful and articulate Judge Thelton Henderson of the Northern District, issued its interim report and received written comments this year from more than twenty different organizations, government officials, pro se litigants, and community members. The task force is holding public hearings next month, and we will have a circuit wide pro se conference in San Diego next month as well. We hope that the task force's final report can be presented next year.

Public Information and Community Outreach (PICO) –now chaired by Judge

Lasnik came closer to completing its project to meet with media reps in all of the districts with meetings in Los Angeles and Phoenix. A highlight of the hugely successful Phoenix meeting may have been my absence, necessitating the substitution of Circuit Judge Mike Hawkins . He did much to disabuse the myth that the Ninth Circuit has most of its cases reversed by the Supreme Court. He pointed out that while we decided more than 12,000 cases last year, only 1007 had petitions for certiorari filed in the Supreme Court and only 19 were granted.

This past term the reversal rate was not terribly remarkable. What was remarkable, again however, was the importance and difficulty of the issues in cases that went to the Court from the Ninth Circuit, ranging from Grokster to medical marijuana.

Our Jury Trial Improvement Committee, chaired by District Judge Susan Bolton of Arizona, hopes to complete its second report next year, and I am hopeful that by the time we meet in Huntington Beach, that committee will be ready to focus on spreading its recommendations to federal courts on a national basis. Her committee has done outstanding work.

I wish I could tell you about all the work being done by many committees ranging from drafting jury instructions to monitoring the cost of capital case litigation, but there is just not time. My thanks to all of the lawyers, judges, and staff members who have worked so diligently and well throughout the year. A special nod goes to our Circuit Executive Office headed by Greg Walters, and his most capable deputy, Terry Nafisi.

It has now been four and one-half years since I accepted the chief's gavel from Procter Hug, and I have asked a lot of lawyers and judges to do a lot of tough jobs. I am very proud of our circuit when I report that no one has ever said no (so those few of you out there who have recently told me they need to "think about it" take heed.)

And because this year's remarks have focused on service, let me take a moment to pay tribute to some of our judges who have done remarkable things.

Included in the picture that I showed at the beginning of this talk was another circuit judge, who was a little hard to see, Judge Stephen Trott. He is also

a true citizen of the Ninth Circuit, appointed from California and now residing in Idaho, and took senior status this year. Steve is a magician, and a musician. During his college days, he was a member of the original Highwaymen, of “Michael, Row Your Boat Ashore” fame. The group has reunited, and gives concerts all over the country to benefit charities.

Because this summer marks the 60th anniversary of the end of World War II, I also want to pay tribute to our judges who served in that war, many of whom are still contributing greatly to the work of the circuit, though all now are over 80. Judge Ted Goodwin, one of my predecessors as Chief, is here with us this afternoon; he served both in Europe and in the Pacific. Circuit Judge Harry Pregerson was wounded in the Pacific, and Judge Warren Ferguson fought in Africa and Italy. Senior District Judge Jim Fitzgerald of Alaska, served in the Marine Corps in the Pacific Theater, receiving three Air Medals and the Distinguished Flying Cross. Senior Judge Howard Turrentine of San Diego, now 91, still tries criminal cases. He was commended for his W.W. II intelligence work in the Philippines. Senior Judge Edward Reed of Nevada, was taken prisoner at the Battle of the Bulge. Senior Circuit Judge Alárcon was there too and received multiple decorations. Senior Judge Sam King of Honolulu, served in the Navy in the Pacific as did his wife Ann. Judge William Rea served in the Navy as a gunnery officer of a destroyer in the Pacific and was awarded a presidential unit citation. There are many more.

For a different and tragic aspect of our wartime history, we should also recognize two judges of Japanese ancestry, Senior District Judge Takasugi and Senior Circuit Judge Tashima, children during the war, who were interned with their families on our own west coast, and went on to serve their nation as judges.

The point of all of this is simple. We have a lot of folks, including figures of heroic proportions, who have served and continue to serve the needs of our nation and its people in countless ways. And public service is what our courts are for, as well, so let us not forget that mission.

Let me close, as I like to do, with a brief reprise of four of the most memorable experiences for me of the past year.

First, enjoying the generosity of the chief bankruptcy judges who dug into their personal pockets in May to buy me a ticket to Tchaikovsky’s opera, *La Pique*

Dame, or the Queen of Spades, performed by the San Francisco Opera – this is a wonderful and wonderfully appropriate opera about a Russian gentleman with a gambling problem who in the end loses all his money and shoots himself – a musical reminder that the new Bankruptcy Act goes into effect next October.

Second, being present at the special ceremony in the Northern District of California honoring its outgoing Chief Judge Marilyn Patel, a friend for decades. The class of the Northern District was illustrated when they flew in Marilyn's favorite author and poet, Samuel Hazo, who did readings in her honor.

Third, traveling to Fresno for a dinner meeting of the San Joaquin County Bar Association in their spectacular, but not quite finished, new federal courthouse. Finding the restroom was a bit of a challenge, but hearing Senator Feinstein talk about fighting for the independence of the judiciary "till the cows come home" was worth the trip.

Finally, appearing in New York City at the gala banquet of the National Asian Pacific American Bar Association to present their very first Distinguished Achievement Award posthumously to the family of my beloved Ninth Circuit Arizona colleague Thomas Tang. Our departed Asian American colleague, the late Herb Choy, was there in spirit. I took the opportunity to quote Wally Tashima, who a few years back, was asked about his internment experience during W.W. II and he said "the role of the federal courts is to make sure the government obeys the law." And I say that is a pretty good credo, for then and for now.

The entire evening was a stunning reminder of the quality and diversity of judges I have had the privilege of knowing in this great circuit – and with all respect to Justice O'Connor and her colleagues in Washington – who have to sit with the same folks for years on end – that diversity makes this job, still, for me, the greatest job the legal profession has to offer.

Thank you all for being here, for all your contributions, and enjoy the conference.